89-339

No.

In The

Supreme Court of the United States

October Term, 1989

VALERIE NOEL STEELE

Petitioner

v.

O. C. NOEL JR. & JEAN HYMAN, Executors

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

George S. Steele Jr. *Attorney for Petitioner*
2909 33rd Place, N.W., Washington D.C. 20008
(202) 966-7204

August 23, 1989

QUESTION PRESENTED

Whether the failure of the New York Supreme Court to allow a hearing on the petitioner's objections to the final accounting of the conservatrix of her father's property, when combined with the failure of the Surrogate's Court to consider and determine those same objections (as had been ordered by the Supreme Court) in the final accounting in her Father's estate, constitute a failure of due process?

LIST OF PARTIES

The parties are: Valerie Noel Steele, petitioner and Jean Hyman, executrix of Julian Hyman, who, with O. Curtis Noel Jr., were the original executors of the estates of Ogden C. Noel (the Father) and Norbert L. Noel (his son).

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STATUTORY REFERENCES

TEXTBOOKS, TREATISES

REFERENCES TO ALL OFFICIAL AND UNOFFICIAL OPINIONS BELOW.

Apparently the opinions below are not reported as they can not be located in the N. Y. S. 2d indexes. They are reproduced in pertinent part in this petition or its appendixes.

JURISDICTIONAL STATEMENT.

This Honorable Court should take jurisdiction under the due process clause because the New York Court of Appeals in a decision dated June 8, 1989

(and apparently entered the same day) held that the failure of the Surrogate's Court to follow an earlier reference to it of certain issues by the Supreme Court, Albany County, raised by the petitioner's objections, and the Surrogate's failure to allow a trial on the merits of those objections, did not directly involve a substantial constitutional question. This holding conflicts with numerous holdings of this Honorable Court.

28 U.S.C.A. 1257 (as amended in 1988) provides the statutory basis for jurisdiction as follows:

> (a) Final judgments ... rendered by the highest court of a State ... may be reviewed by the Supreme Court by writ of certiorari, where ... any ... right ... is specially set up or claimed under the Constitution ... of ... the United States.

THE CONSTITUTIONAL PROVISION INVOLVED.

The 14th Amendment to the Constitution says: "... nor shall any state deprive any person of ...property without due process of law..."

STATEMENT OF FACTS.

This case involves the effects of the senility of Ogden Noel, the father of three children, and the failure of the Surrogate's Court to follow an earlier order of the Supreme Court of New York sitting in the conservatorship proceedings concerning Ogden.

Ogden, hereafter the Father, was born in 1898. His future wife Julia, hereafter the Mother, was born in the same year. They married and had three children: Norbert, the eldest son, Valerie, the Petitioner, and Curtis (whose full name is Ogden Curtis Noel Junior) a Respondent. (The other respondent is the executrix of Julian Hyman who was the lawyer for Norbert and, with Curtis, a

co-executor of Ogden's alleged will.)

The family lived in White Plains, New York from 1932 until each child moved away from home. Norbert, the last child to leave home, moved from White Plains to Albany about 1957, but he kept his apartment in White Plains.

In the early 1970s, the Father began to suffer from weakening mental capactiy. In 1976 the Mother broke her hip and was hospitalized and thereafter was bedridden. In January, 1976, the Father was assaulted, was examined for his physical and mental incapacities, and was hospitalized in numerous places. (Doctor Maxon in 1982 reported as follows:

> We first cared for your father, Ogden Noel, on 2/28/76 at the Albany Medical Center Hospital for chronic lung disease, pneumonia, and asthmatic bronchitis. There was at that time, associated cerebral cortical degeneration. This was further confirmed by evaluation at the Burke Rehabilitation Hospital in March, 1976. A

re-evaluation at the Albany Medical Center June 9 through 18, 1976 included a neurological evaluation by Dr. Joel Woodruff who made a diagnosis of moderate demential with frequent mental confusion. It is the opinion that Mr. Ogden Noel was at that time incapable of handling his own personal affairs and of making decisions in regard to his day to day activities. This condition has gradually progressed since that time.

Years later the Petitioner learned that her father had allegedly signed a will on March 22, 1976. On that date the Burke Rehabilitation Institute reported her father's condition as

> PRESENT ILLNESS: The patient was found to be totally confused and is unable to give a reliable history (p.3))

In 1976, Norbert moved both his parents to Albany, hired nursing aides and tried to maintain them in an appartment next to his in Albany. He had taken over *de facto* management of their financial affairs.

In April, 1977 Norbert had to, and did, place his

Father in a Nursing Home in Albany where he remained until his death in 1984. In November, 1977, the Mother died. Norbert was appointed administrator of her estate with Julian Hyman (a Respondent) as his lawyer. The law firm of Hyman & Gilbert P.C. represented them.

From about 1976 to 1981, the Petitioner unsucessfully sought information from Norbert and Hyman as to the assets and expenses of her Father and Mother.

Norbert died in November, 1981 and shortly thereafter Curtis and Hyman (the Respondents) were appointed co-executors of his estate by the Surrogate of Westchester County.

In December 1981, the Petitioner (with her husband) asked the Supreme Court, Albany County, for appointment as committee or conservators of her Father. The Respondents opposed, saying that Curtis and Valerie, as potential heirs of their Father, had a conflict of interest as, presumably,

they might not spend his money for him but save it waiting to inherit it. The parties to this proceeding were the petitioner, the Respondent Curtis personally and Curtis and Hyman as representatives of Norbert's estate, Ogden and the Nursing Home. The Supreme Court also appointed a guardian-ad-litem for Ogden.

In April, 1982, after a contested hearing, the Supreme Court appointed Ogden's 87 year old sister as Conservatrix of his property.

Nevertheless, since the Petitioner asserted that Norbert had wasted and misappropriated his Father's assets, the Supreme Court ordered an audit of Ogden's records for the period 1970 to 1981 by a CPA. However Respondents delayed the audit and Ogden died in April, 1984 , and the audit report was not filed until May, 1984, and it was not furnished to the Appellant until October, 1984. While that report showed that assets of Ogden had been wasted and used for Norbert's

personal benefit during the period 1977 to 1981, the auditors never testified or were subjected to confrontation nor cross-examination. At least two of their major assumptions were erroneous but the petitioner was never allowed to examine them. Thus, when the Conservatrix filed her final accounting in mid-1984, and did not list these missing assets as property of Ogden, the Petitioner filed objections to these omissions. The Supreme Court, however, *without allowing discovery or a hearing on the objections,* issued an order which discharged the Conservatrix and said as follows:

> ORDERED, that the report of the accounting firm of Ernst & Whinney, dated May 9, 1984, be filed with the clerk of this court and the clerk of the Surrogate's Court of Westchester County *and all matters and issues embraced by that report be and they hereby are referred to the Surrogate's Court, Westchester County for consideration and*

determination...(italics added by the Petitioner.)

Meanwhile, in late 1984 and early 1985, the Respondents had petitioned the Surrogate of Westchester County for appointment as co-executors of Ogden's estate. The Appellant filed various objections. Nevertheless, the Surrogate ruled that misconduct, not conflict of interest, was the standard for the disqualification of the co-executors (respondents here), and refused to postpone the hearing thereon, thereby preventing the Petitioner from presenting the testimony of Ogden's doctor on his senitily and the misconduct of the Respondents in presenting his alleged will and filing a void waiver of notice in Norbert's estate. Thus, the Petitioner was forced to withdraw her objections, and the Respondents were appointed co-executors of Ogdens estate in early 1985, just before the Supreme Court issued its order quoted above. The parties in this

proceeding before the Surrogate were the Petitioner, the Respondents Curtis and Hyman, represented by Hyman & Gilbert, and the State Tax authorities. Further, and notwithstanding medical records which said that Ogden suffered from senility, the Surrogate, in an *ex parte* proceding, admitted Ogden's alleged March 22, 1976 will to probate.

When the Respondents, as co-executors of Ogden's estate, presented their final accounting, which also neglected to include the assets wasted and used by Norbert for his personal benefit, the Petitioner filed objections which were substantialy similar to those filed before the Supreme Court. See page A- for a copy. The Surrogate, without allowing discovery or a hearing on the objections, dismissed them saying:

> All the objections...refer to assets which were owned by the decedent prior to December 31, 1981 for which the conservatrix appointed for him *received, or should have recovered and which were*

accounted for by her or should have been accounted for by her. While this court has not been provided with a copy of the objections made to the accounting of the conservatrix, the executor-movant alleges that these same objections were made in the accounting proceeding of the conservatrix. *Even if not made, they could have been made and should have been made to the account of the conservatrix and cannot at this time be relitigated.* The account of the conservatrix was formally approved and a final decree entered thereon

The account filed by the petitioners [Respondents here] in this proceeding lists all the items turned over by the conservatrix to the executors. Accordingly, Part 1 of the objections to the accounting filed herein are dismissed.

The Petitioner appealed to the Appellate Division, and later to the New York Court of Appeals. The Appellate Division sustained the Surrogate, by a decision and order dated August 1, 1989, saying:

The Surrogate's dismissal of the challenged objections was appropriate, as

these objections referred to alleged ...waste of assets owned by the decedent [Ogden] during his lifetime and prior to the appointment of a conservatrix...The Surrogate properly construed a previous order of the Supreme Court...which judicially settled the accounts of the conservatrix...*as having disposed of the objections set forth by the instant objectant* ... Moreover, the objectant's claim that the failure to hold a hearing with respect to her objections amounts to a denial of due process is without merit, as she had received notice of and exercised her opportunity to be heard in prior extensive litigation regarding all aspects of the decedent's affairs. (Italics added.)

The Petitioner had also objected to the final accounting in Ogden's estate where it showed commissions to the Respondents as co-executors of Ogden's estate and fees to Hyman & Gilbert. She asserted that the co-executors were guilty of misconduct in not making a claim against

themselves as co-executors of Norbert's estate, and also asserted that Hyman & Gilbert P.C. should not receive fees because they represented both "plaintiff" and "defendant" estates. However, the Surrogate also dismissed the these objections. The Petitioner also appealed these dismissals to the Appellate Division (and later to the New York Court of Appeals.) The Appellate Division affirmed.

The Court of Appeals then affirmed both decisions of the Surrogate saying:

> The appellant [Respondent here] having filed notice of appeal in the above title and due consideration having been thereupon had, it is
>
> ORDERED, that the appeal from the Appellate Division order dated February 6, 1989 be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitution question is directly involved, and it is
>
> ORDERED, that the appeal from the

Surrogate's Court order dated March 30, 1987 be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that a separate appeal does not lie from that order which has been affirmed by the Appellate Division (NY Const art vi, sect 3; CPLR 5601).

The Court of Appeals decision was rendered on June 8, 1989 and the Appellant filed this petition in August, 1989.

STAGE IN THE PROCEEDING AT WHICH FEDERAL QUESTION WAS RAISED, METHOD OF RAISING SAME, AND THE WAY THE LOWER COURTS PASSED THEREON, WITH QUOTES FROM THE RECORD.

The Petitioner responded to the Respondents' motion to dismiss her objections to the final accounting of the executors by arguing that the doctrine of law-of-the-case, and the Supreme Court's prior reference to the Surrogate of all issues embraced in the report of Ernst & Whinney,

required the Surrogate to provide her with a hearing on those issues. The Petitioner was surprised that the due process issues were not obvious to the Surrogate, so when she received his decision dated February 19, 1987, and the Respondents' proposed order implementing it on March 19, 1987, she immediately filed "suggestions" (dated March 20th, 1987) which read, in part, as follows:

> 4. Further I am advised and believe that the "Due Process" clauses of the Constitutions of New York (Article 1 Section 6) and of the United States, together with the provisions of CPLR 3101 "disclosure", give me the right to adequate pretrial discovery "material and necessary" in the prosecution of this action against Petitioners [Respondents here] for their failures to make claims against the estate of Norbert L. Noel. See Aftuck v. Aftuck 100 A.D. 2d 672, 437 NYS 2d 846, (1984), Fuielli v. Amer. Soc. for the Prevention of Cruelty to Animals 23 NYS 2d 983 (1940), Matter of Barbara R.

66 A.D. 2d 800, 410 NYS 2d 894., Compare Massop v. LeFevre 127 Misc. 2d 910, 487 NYS2d 925 (1985), Harper v. Levine 41 A.D.2d 975, 343 NYS2d 201, In Re Custody of Orneika J. 122 A.D.2d 78, 491 NYS2d 639 (1985).

Thus, I respectfully ask the Court to enter the attached order [denying the motion to dismiss objections.]...

Respectfully submitted,

/s/ Valerie Noel Steele ...

The Surrogate was not persuaded by this document and entered an order dated March 30, 1987 dismissing the petitioner's objections.

ARGUMENT: REASONS FOR GRANTING THE WRIT.

THE FAILURE OF THE SURROGATE TO FOLLOW THE DOCTRINE OF "LAW-OF-THE-CASE" DENIED THE PETITIONER DUE PROCESS BY PRECLUDING DISCOVERY OR TRIAL ON THE MERITS OF HER OBJECTIONS TO THE ACCOUNTING OF OGDEN'S CO-EXECUTORS.

The Constitution of the United States , in the 5th and 14th amendments, grants to the citizens thereof the rights to notice and a hearing on the merits of disputes affecting the property of those citizens. A fundamental of due process is the right to discovery and a trial on the merits. Professors Rotunda, Nowak and Young state the rule as follows:

> In all instances the state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken. "Treatis on Constitutional Law,

Substance and Procedure," R. Rotunda, J. Nowak, J. Young, West Publishing Co., 1986, vol. 2, page 201.

Professors Field, Kaplan and Clermont state the proposition in this fashion:

> A reasonable opportunity to be heard is also indispensible to proceedural due process ... indeed, it would seem that the real concern of procedural due process here is opportunity to be heard. Notice is merely the means to make possible the exercise of that right. "Materials For a Basic Course in Civil Procedure," R. Field, B. Kaplan, K. Clermont, The Foundation Press Inc., 5th ed. 1984, page 941.

In the context of long arm statutes, the Court has said,

> Quite different from the question of a State's power to discharge trustees is that of the opportunity it must give the beneficiaries to contest...there can be no doubt that at the minimum they require that deprivation of ... property by adjudication be preceeded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank 339 U.S. 306, 313; 70 S. Ct.

652, 656; 94 L. Ed. 865 (1950.)

In the context of pretrial seizure of assets the professors Rotunda et al, at vol. 2, page 234, say as follows:

> ...the alleged debtor must be afforded some fair procedure to determine whether his property should be taken and transferred to the other party.

There are other similar holdings by this Court, for example: Snaidach v. Family Finance Corp. 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969.) , Fuentes v. Shevin 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2nd 556 (1972)(conditional sale,) North Georgia Finishing, Inc. v. DI-CHEM Inc. 419 U.S. 601, 95 S. Ct. 719, (1975)(garnishment), compare Mitchell v. W.T. Grant Co. 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed. 406 (1974)(conditional sale,) Roller v. Holly 176 U.S. 398, 407, 20 S. Ct. 410, 44 L.Ed. 520 (1899)(the length of notice to out-of-state parties must be reasonable, five days was insufficient to get from Virginia to Texas.)

While a party has no vested right to any particular rule of proceedure, Eskimo Pie Corp. v. Whitelawn Dairies Inc. 284 F. Supp. 987 (D.C. N.Y. 1968), the doctrine of law of the case is one of substance, see *post.*

The Supreme Court, County of Albany, took a judicial "short cut" when it discharged Ogden's conservatrix, but it did not violate the petitioner's due process right to a trial because it transferred her objections, also raised by the auditor's report, to the one court which now had jurisdiction of both Ogden's estate and Norbert's estate, that is the Surrogate's Court of Westchester County. The Supreme Court had had jurisdiction of all the parties (and the conservatrix and her bondsman) while Ogden lived, New York, Consol. Laws, Chap. 27, Art. 77, section 77.01, but upon his death jurisdiction passed to the Surrogate of Westchester County. Surrogate's Court Procedure Act (SCPA) Art. 2, section 201,

paragraphs 1-3, and sections 202,203 and 205. Furthermore, the Supreme Court had the power to limit the authority of the conservatrix. *id.* section 77.19. This it did by narrowly stating her authority. Thus the conservatrix did not have authority to sue Norbert's estate. *id.* but see, Chap. 27, Art, 77, sect. 77.19 and Art. 77, sect. 78.15(a) and especially (e). Further, the conservatrix did not receive the auditor's report until May which was after Ogden's death on April, 24, 1984. Since Norbert's estate, in the persons of the Respondents, was already a party to the conservatorship proceeding, and the same individuals were recently appointed co-executors of Ogden's estate, the Supreme Court, in effect, substituted the Respondents for the very elderly conservatrix (she died a resident of Maine in April, 1986.) The Supreme Court made no adjudication of the merits of the Petitioner's objections but referred those merits to the

Surrogate. The Surrogate was authorized by SCPA, sect. 209, para. 1 and 3 "...to receive for trial any such action or proceeding pending in the Supreme Court which by order of the latter court be transferred to the Surrogate's Court on the prior order of that court." See also par. 4. Inexplicably, the Surrogate neglected that authorization, the March, 1985 order of the Supreme Court and the commands of the due process clauses of the two constitutions.

The doctrine of "law-of-the-case" is a rule of law, cf. Trustees of The Puritan Church v. United States, 191 F. Supp. 670, 671 (D.D.C. 1960, aff'd per curiam 294 F. 2d 743 D.C. Cir. 1961.) New York adheres to this doctrine (except in the instant case). Switzer v. Switzer, 114 A.D. 2d 499; 494 N.Y.S.2d 412, 413 (Sup. Ct. App. Div. 2nd Dept. 1985; Ricco v. Deepsdale Garden Apartments Corp. 113 A.D. 2d 822, 493 N.Y.S. 2d 498, 501 (Sup. Ct. App. Div. 2nd Dept. 1985); Comstock & Co. v. Duffy,

43 A.D. 2d 704, 705, 350 N.Y.S.2d 9. The decision of the Supreme Court, County of Albany, was a final decree and thus should have been followed by the Surrogate. cf. United States v. U.S. Smelting, Refining & Mining Co. 339 U.S. 186, 198 (1950.) Instead, he ignored or misconstrued it by saying that the conservatrix should have made claim against the Respondents.

Thus, this Honorable Court has held that confrontation and cross-examination are part of the due process rights of individuals accused by a legislative commission, Jenkins v. McKeithen 395 U.S. 411, 89 S.Ct. 1843, 23 L. Ed. 2d 404 (1969), that termination of welfare rights must be done after a due process hearing, Goldberg v. Kelly et al 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), that a law graduate may not be denied admission to the bar absent confrontation with his accussers, Willner v. Committee on Character and Fitness etc. 373 U.S. 96, 83 S Ct. 1175, 10 L

Ed 2d 224 (1963), and the Court has said that "[t]he fundamental requsite of due process of law is the opportunity to be heard Louisville & Nashville R. R. Co. v. Schmidt 177 U. S. 230, 236, 20 S Ct. 620, 44 L Ed. 747 (1900); Simon v. Craft 182 U.S. 427, 436, 21 S. Ct. 836, 45 L Ed 1165 (1901) in a due process case entitled Grannis v. Ordean 234 U.S. 385, 394, 34 S. Ct. 779, 58 L Ed 1363 (1914.)

Thus the petitioner respectfully submits that these opinions indicate that the due process clause provides her the right to a hearing on the merits of her objections to the final accounting of the co-executors of her father's estate before the courts of New York may properly decide those objections.

CONCLUSION.

The petitioner respectfully asks this Court to grant this writ of Certiorari to the New York Court of Appeals.

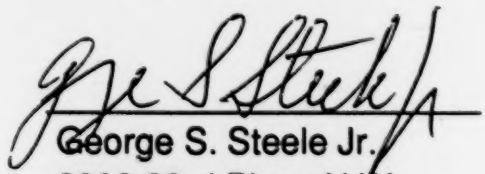
Respectfully submitted.

August 23, 1989

George S. Steele Jr.
2909 33rd Place, N.W.,
Washington D.C. 20008
(202) 966-7204
Attorney for the Petitioner

CERTIFICATE OF SERVICE

I certify that I made service upon the respondents by depositing three copies of this petition in a United States Postal Service mail facility, postage prepaid, addressed to Hyman & Gilbert P.C., 1843 Palmer Avenue, Larchmont, New York on or before the 90th day after June 8, 1989.



George S. Steele Jr.
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D11L
State of New York
Supreme Court County of Albany
* *

In the Matter of the Petition of * Order
George Schryver Steele and Valerie *
Noel Steele for Appointment as Con- * Index No.
servators or Committee of the * 11713-81
Person and Property of Ogden C. Noel *
* *

Florence N. Hodgkins, conservatrix of the property of Ogden C. Noel, deceased, having duly moved this court for an order settling the final account submitted by her as conservatrix and granting the other relief requested in her affidavit sworn to July 18, 1984, and, the said motion having regularly come on to be heard

NOW, upon reading and filing the order to show cause dated August 20, 1984 signed by the Hon. Edward S. Conway, Justice of the Supreme Court, the affidavit of Florence N. Hodgkins, duly sworn

to July 18, 1984 and the affidavit of Raymond S. Zierak, Esq., duly sworn to August 15, 1984, the final account submitted by the conservatrix and the report prepared by the accounting firm of Ernst & Whinney dated May 9, 1984, all of the foregoing having been submitted in support of the said motion, and the objections of Valerie Noel Steele to the final inventory and account sworn to on August 28, 1984 and the exhibits attached thereto having been submitted in opposition to the said motion, and the affidavit of John R. Casey, sworn to September 11, 1984 also having been submitted in support of the said motion and the affidavit of the guardian ad litem, Peter L. Rupert, dated October 1, 1984 having also been submitted to the court and after hearing Kohn, Bookstein & Karp, P.C., attorneys for Florence N. Hodgkins, conservatrix of the property of Ogden C. Noel, deceased, Raymond S. Zierak, Esq., of counsel, in

support of the said motion and Valerie Noel Steele, pro se, and George Steele, Esq., in opposition thereto and Bouck, Holloway, Kiernan and Casey, Thomas J. Johnson, Esq. having appeared in support of the said motion and Peter Rupert, Esq., gardian ad litem, having appeared and submitted his report to the court in connection with the motion, and due deliberation having been had thereupon and the court having rendered its written decision,

NOW, upon motion of Kohn, Bookstein & Karp, P.C., attorneys for Florence N. Hodgkins, conservatrix of the property of Ogden Noel, deceased, it is

ORDERED, that the said motion be and the same hereby is in all respects granted, and it is further

ORDERED, that the final account submitted by the conservatrix be and the same hereby is judicially

settled, approved and allowed, and it is further

ORDERED, that the fees of Kohn, Bockstein & Karp P.C., attorneys for the conservatrix, are hereby fixed and allowed in the sum of $8,000, together with disbursements incurred in the amount of $477.71 for a total allowance of $8,477.71 and it is further

ORDERED, that the fee to the Bankers Trust Company for the services which it has rendered in this matter is fixed and allowed in the sum of $25,979.57, and it is further

ORDERED, that the report of the accounting firm of Ernst & Whinney, dated May 9, 1984, be filed with the clerk of this court and the clerk of the Surrogate's Court of Westchester County and all matters and issued embrased by that report be and

they hereby are referred to the Surrogate's Court, Westchester County for consideration and determination, and it is further

ORDERED, that the Florence N. Hodgkins, as conservatrix be and she hereby is directed to pay from the funds of the conservatee to Kohn, Bookstein & Karp, P.C.,the total sum of $8,477.71 in payment of the attorneys' fees and disbursements allowed herein, and it is further

ORDERED, that the Florence N. Hodgkins, as conservatrix be and she hereby is directed to pay from the funds of the conservatee the sum of $25,000 to the accounting firm of Ernst & Whinney for services rendered in preparing the report dated May 9, 1984, and it is further

ORDERED, that Florence N. Hodgkins, as

conservatrix be and she hereby is directed to pay from the funds of the conservatee the unpaid expenses listed in Schedule E of the final account and she is hereby directed to pay to Child's Nursing Home Co.,Inc. the sum of $5,096.63 in payment for nursing services and miscellaneous charges and she is further authorized to retain from the funds of the conservatee the sum of $9l0.00 as reimbursement for out of pocket expenses incurredby her as conservatrix, and it is further

ORDERED, that Florence N. Hodgkins, as conservatrix be and she hereby is directed to pay from the funds of the conservatee to the Bankers Trust Company the sum of $25,979.57 in payment of the fees allowed to the Bankers Trust Company hereby, and it is further

ORDERED, that Peter Rupert, Esq., guardian ad litem, be and he hereby is allowed the sum of $750.00 as and for the services rendered by him as guardian ad litem in this matter and that Florence N. Hodgkins, as conservatrix be and she hereby is directed to pay to Peter Rupert, Esq. from the funds of the conservatee the said sum of $750.00, and it is further

ORDERED, that Jonathan Harvey, Esq., guardian ad litem,be and he hereby is allowed the sum of $750.00 as and for the services rendered by him as guardian ad litem in this matter and that Florence N. Hodgkins, as conservatrix be and she hereby is directed to pay to Jonathan Harvey, Esq. from the funds of the conservatee the said sum of $750.00 and it is further

ORDERED, that Florence N. Hodgkins, as

conservatrix, after making the payments directed to be made herein, be and she hereby is directed to pay to Julian Hyman, Esq. and Curtis Noel, Jr., as co-executors of the Estate of Ogden C. Noel, the balance of monies of the conservatee remaining after the said payments have been made, and it is further

ORDERED, that upon making the payments aforesaid, the conservatrix and the Transamerica Insurance Company, the surety on her bond, be and they hereby are discharged and released from any and all liability and responsibility in this matter.

/S/ Edward S. Conway
J.S.C.

Dated: March 22nd, 1985
Albany, New York

/S/ Marie A. Reilly
DEPUTY COUNTY CLERK...

SURROGATE'S COURT: WESTCHESTER COUNTY

****

Accounting of Jean Hyman as Executrix of Julian Hyman, Deceased and Ogden C. Noel, Jr., as surviving Executor of the Estate of

OGDEN C. NOEL

Deceased.

****

MEMORANDUM DECISION

File No. 1984/1181

Hyman & Gilbert
Attorneys for Petitioners

Robin A. Bikkal
Attorney for State Tax Comm.

Valerie Noel Steele,
Respondent Pro Se

BREWSTER - S

Objections have been filed by a daughter of the decedent to the final accounting proceeding by the

executors of decedent's estate, one of whom is her brother. The objectant also filed objections in other proceedings brought by her brother as a fiduciary in the estates of a deceased brother and their mother. The petitioners have moved for an order dismissing the objections because they refer to matters for which the executors had no responsibility or accountability.

On April 22, 1982, decedent's sister was appointed the conservatrix of his assets by a Justice of the Supreme Court. Because of the rancor and recriminations engenered during the course of the proceedings, the Court directed that a well known and respected firm of public accountants prepare an audit of all assets of the decedent for the years 1970 through 1981.

The decedent died on April 11, 1984. His will dated March 22, 1976 was admitted to probate on January 7, 1985. Upon his death, the

conseravtorship terminated. A final account was submitted by the conservatrix on May 9, 1984 together with the report of the accounting firm of decedent's assets. Notice of this accounting was served upon all interested parties and objections thereto were filed by the objectant in this proceeding. The order of Mr. Justice Edward S. Conway, Justice of the Supreme Court, dated March 22, l985, dismissed the objections filed; approved, allowed and judicially settled the account submitted by the conservatrix. After providingf for the payment of fees, allowances and expenses, the order directed that the balance remaining be paid to the executors of this estate. Schedule A of the accounting herein lists all of the assets received from the conservatrix.

Part I of the objections is directed to the omission of 25 items from Schedule A of the

account. All of the unlisted assets, except item 2, describe transactions which occurred prior to Dcember 3l, l98l. Item 2 objects to the omission of untraced funds approximating $l7,000.00 identified in the report made of the public accounting firm. All the objections listed in part I refer to assets which were owned by the decedent prior to December 3l, l98l for which the conservatrix appointed for him received, should have received or should have recovered and which were accounted for by her or should have been accounted for by her. While this court has not been provided with a copy of the objections made to the accounting of the conservatrix, the executor-movant alleges that these same objections were made in the accounting proceeding of the conservatrix. Even if not made, they could have been made and should have been made to the account of the conservatrix and cannot at this

time be relitigated. The account of the conservatrix was formally approved and a final decree entered thereon.

The account filed by the petitioners in this proceeding lists all the items turned over by the conservatrix to the executors. Accordingly, Part I of the objections to the accounting filed herein are dismissed.

***

Settle order

February 19, 1987

SURROGATE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

____AD2d___ Submitted June 23, 1988

ISAAC RUBIN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, Jr., JJ.

1459E
In the Matter of Ogden C. Noel, deceased
Jean Hyman, etc., et al., respondents; Valerie Noel Steele appellant.

DECISION & ORDER

Valerie Noel Steele, Washington, D.C. (George S. Steele on the brief), appellant pro se.

Hyman & Gilbert, New Rochelle, N.Y. (Donna R. Kramer of counsel), for respondents.

In a proceeding for an accounting of the

executors of the estate of the decedent Ogden C. Noel, the objectant appeals from so much or an order of the Surrogate's Court, Westchester County (Brewster, S.), dated March 30, 1987, as dismissed certain of her objections.

ORDERED that the order is affirmed insofar as appealed from, with costs payable by the appellant.

The Surrogate's dismissal of the challenged objections was appropriate, as these objections referred to the alleged misappropriation and waste of assets owned by the decedent during his lifetime and prior to the appointment of a conservatrix to oversee his affairs. The Surrogate properly construed a previous order of the Supreme Court, Albany County (Conway J.), which judicially settled the accounts of the conservatrix upon the death of the decedent, as having disposed of the

objections set forth by the instant objectant in that proceeding which were virtually identical to those she now raises in the present proceeding (see generally, Schuylkill Fuel Corp. v Nieberg Realty Corp., 250 NY 304). Moreover, the objectant's claim that the failure to hold a hearing with respect to her objections amounts to a denail of due process is without merit, as she had received notice of and exercised her opportunity to be heard in prior extensive litigation regarding all aspects of the decedent's affairs.

RUBIN, J.P., KOOPER, SULLIVAN and BALLETTA,... concur.

ENTER:

/s/ MARTIN H. BROWNSTEIN

Martin H. Brownstein

Clerk

(certificate largely illegible)

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the eight day of June A.D. 1989

PRESENT, Hon. Sol Wachtler, *Chief Judge presiding*

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2 Mo. No. 624 SSD 42
In the Matter of Ogden C. Noel,
Deceased.
Jean Hyman &c., et al.,
Respondents
Valerie Noel Steele,
Appellant

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal from the Appellate Division order dated February 6, 1989 be and the same is hereby dismissed, byt the Court sua sponte, upon the ground that no substantial

constitutional question is directly involved ...

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/s/ Donald M. Sheraw

Donald M. Sheraw

Clerk of the Court

THE STATE OF NEW YORK
THE SURROGATE'S COURT:
COUNTY OF WESTCHESTER

IN THE ESTATE OF
OGDEN C. NOEL
DECEASED

Index No. 1181-84
OBJECTIONS

My name is VALERIE NOEL STEELE. I am the daughter of Ogden C. Noel, the deceased and the sister of O. C. Noel Jr. one of the petitioners. I hereby object to the accounting covering the period April 11, 1984 to October 13, 1985 filed by Ogden C. Noel Jr. and Jean Hyman.

My brother Norbert L. Noel was de facto managing

agent for my father from at least as early as 1976 until Norbert's death in Novermber 1981. Norbert refused me access to my father's financial records. My father's conservatrix did likewise and the petitioners have continued this practice. Thus these objections are made on partial information.

PART I

I object because schdule A does not list the following items:

(1) Stocks, bonds and bank accounts transferred from my father to Norbert in the period 1974-1981 when my father was senile and mentally incompetent in the estimated amount of $500,000.

(2) Funds listed as "untraced" in the report of Ernest & Whinney dated May 9,1984, in the approximate amount amount of $17,000.

(3) Funds transferred to Norbert in 1976 of $270.

(4) Funds transferrd to Norbert in 1979 of $800.

(5) Funds transferred to Norbert in 1980 of $1,000.

(6) Funds transferred to O. C. Noel, Jr. in 1981 of $877.75.

(7) Excessive income and property taxes paid in 1974 of approximately $10,000.

(8) Excessive income and property taxes paid in 1975 of approximately $3,000.

(9) Excessive income and property taxes paid in 1977 of approximately $3,500.

(10) Insurance paid in 1976 of $161.04.

(11) Rent paid during 1978-1981 on apartment in Albany of approx. $9,310.

(12) Rent on office from 1976-1981 of approx. $9,000.

(13) Rent on apartment in White Plains from 1977-1981 of approx. $2,500.

(14) Utilities of approx. $10,287.40.

(15) Miscellaneous of $6,079.04.

(16) Sherman furniture rentals of approx. $500.

(17). Repairs to Coolidge Ave. of approx. $20,000.

(18) Kensico Cemetary lots at $8,452.

(19) Storm doors and windows for Coolidge Ave. at approx. $5,520.

(20) Transfer to "other accounts" in 1979 of $4,000.

(21) Transfer to buy house in Albany about 1979 in unknown amount.

(22) Rent received by Norbert in the informal subleasing of my father's Albany apartment during part of the period 1978-1981 in an unknown amount.

(23) Excessive and unreasonable medical and nursing expenses ordered by Norbert in 1977 of approximately $40,000.

(24) Excessive and unreasonable medical and nursing expenses ordered by Norbert in 1978 of approximately $3,000.

(25) Receipts from the sale of my father's insurance business in an unknown amount.

I ask that the executors be charged with the above listed amounts.

PART II

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PART III

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/s/ Valerie Noel Steele

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(The End Of The Appendix.)